Century Fast Foods, Inc. *and* William Lujan Case 31–CA–116102

July 31, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On January 20, 2016, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing its Agreement to Arbitrate (Agreement). *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016). Applying *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), affd. sub nom. *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612 (2018), the Board found that the Agreement unlawfully required employees, as a condition of their employment, to waive their right to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. *Century Fast Foods*, 363 NLRB No. 97, slip op. at 1. The Board also found that the Agreement violated the Act in two other ways: because employees "reasonably would believe that it bars or restricts their right to file unfair labor practice charges with the Board," and because it requires employees to keep any arbitration confidential. Id., slip op. at 1–2.

The Respondent filed a petition for review with the United States Court of Appeals for the Ninth Circuit, and the Board filed a cross-application for enforcement. On May 21, 2018, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of the Act and must be enforced as written pursuant to the Federal Arbitration Act (FAA). *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018).

On June 29, 2018, the Ninth Circuit granted the Board's motion to vacate the portion of the Board's Order governed by *Epic Systems* and to remand the remainder of the case for further proceedings before the Board. On October 29, 2018, the Board issued a Notice to Show Cause why this case should not be remanded to the administrative law judge for application of the standard set forth in *The Boeing Co.*, 365 NLRB No. 154 (2017).[1] The General Counsel filed a statement of position opposing remand. The Respondent did not file a response. Because no party favors a remand and the remaining allegations may be decided based on the existing record, we find that a remand is unnecessary.

The National Labor Relations Board has considered its previous decision and the record in light of the statement of position filed by the General Counsel. For the reasons that follow, we find that under *Boeing* and its progeny, the Respondent's Agreement unlawfully restricts access to the Board and its processes. On this basis, we conclude that the Respondent violated Section 8(a)(1) of the Act by maintaining the Agreement. However, we dismiss the complaint allegation that the confidentiality requirement in the Agreement unlawfully prohibits employees from discussing wages and other terms and conditions of employment.

I. FACTS

The Respondent operates restaurants selling food and beverages. From October 22, 2012, through February 12, 2013, it required all job applicants to sign and date an employment application that contained the Agreement.[2] In relevant part, the Agreement stated as follows:

[1] Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. Id. If not, the rule or policy is lawful and placed in Category 1(a). If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by balancing "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule," viewing the rule or policy from the employees' perspective. Id., slip op. at 3. As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to interfere with the exercise of Sec. 7 rights outweighs the legitimate interests they serve. Categories 1(a), 1(b), and 3 designate *types* of rules: once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*'s balancing framework. These rules are placed in Category 2. See id., slip op. at 3–4; *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019).

[2] We find no merit in the Respondent's contention that the Agreement was not a required condition of employment. The stipulated facts state that the Agreement was part of the employment application, which the applicant was required to sign as part of the hiring process. There is nothing in the stipulated facts indicating that the Agreement could be severed from the rest of the application and thereby declined. Moreover, even if including it in the employment application was merely an *attempt* to have employees subscribe to the Agreement, the Agreement restricts employees' access to the Board, and "it is unlawful for an employer to *seek* to restrain an employee in the exercise of his right to file charges

> Agreement to Arbitrate**.** Because of the delay and expense of the court system, TACO BELL and I agree to use confidential binding arbitration, instead of going to court, for any claims that arise between me and Taco Bell, its related companies, and/or their current or former employees. Without limitation, such claims would include any concerning compensation, employment including, but not limited to, any claims concerning sexual harassment or discrimination, or termination of employment. Before arbitration I agree: (i) first to present any such claims in full written detail to TACO BELL; (ii) next, to complete any TACO BELL internal review process; and (iii) finally, to complete any external administrative remedy (such as with the Equal Employment Opportunity Commission). In any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration will apply, except that TACO BELL will pay the arbitrator's fees, and TACO BELL will pay that portion of the arbitration filing fee in excess of the similar court filing fee had I gone to court.

II. DISCUSSION

The Ninth Circuit's June 29, 2018 order disposed of all allegations controlled by the Supreme Court's decision in *Epic Systems*, above. The remaining issues for decision are whether the Agreement unlawfully restricts access to the Board and its processes and whether its requirement of confidential arbitration is unlawful. For the reasons that follow, we find a violation as to the first issue and dismiss as to the second.

A. Access to the Board

Although the Supreme Court in *Epic Systems* emphasized that arbitration agreements are to be enforced as written pursuant to the FAA, the Court has also held that this mandate "may be 'overridden by a contrary congressional command.'" *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 5 (2019) (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). In *Prime Healthcare*, the Board explained that Section 10 of the Act establishes just such a contrary congressional command with respect to arbitration agreements that interfere with the right of employees to file charges with the Board. Specifically, we explained that under Sec. 10(b) of the Act, the Board has no power to issue complaint unless an unfair labor practice charge is filed, and Section 10(a) of the Act relevantly provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." Thus, notwithstanding the Supreme Court's decision in *Epic Systems*, the FAA does not authorize the maintenance or enforcement of agreements that interfere with the right to file charges with the Board. Id.

An arbitration agreement that "explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful." Id. Where an arbitration agreement does not contain such an express prohibition—i.e., where the arbitration agreement in question is facially neutral—the Board applies the standard set forth in *Boeing* and determines "whether that agreement, 'when reasonably interpreted, would potentially interfere with the exercise of NLRA rights,'" i.e., the right to file charges with the Board. Id. (quoting *Boeing*, 365 NLRB No. 154, slip op. at 3). Such interference exists when an arbitration agreement, "taken as a whole, make[s] arbitration the *exclusive* forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act." Id., slip op. at 6 (emphasis in original). Further, "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." Id.

Here, the Agreement requires that employees arbitrate "any claims," including without limitation claims concerning, among other things, compensation, employment, and termination from employment. Without more, such language makes arbitration the exclusive forum for resolving all disputes between the Respondent and any of its employees, including claims brought under the Act, thus restricting employees' access to the Board and rendering the Agreement unlawful. See, e.g., id.; *IIG Wireless, Inc. f/k/a Unlimited PCS, Inc.*, 369 NLRB No. 66, slip op. at 2 (2020) (finding unlawful an agreement requiring that "any dispute or controversy. . . arising from or in any way related to my employment with the Company, shall be submitted to and determined by binding arbitration"); *Beena Beauty Holding, Inc. d/b/a Planet Beauty*, 368 NLRB No. 91, slip op. at 2–3 (2019) (finding unlawful an agreement requiring employer and employees "to submit any claims that either has against the other to final and binding arbitration").

In decisions subsequent to *Prime Healthcare*, however, we made clear that the analysis does not end there if the challenged arbitration agreement includes a savings clause, i.e., a clause providing that employees "retain the right to file charges with the Board, even if the agreement otherwise includes claims arising under the Act within its

[with the Board]." *Nash v. Florida Indus. Commission*, 389 U.S. 235, 238 (1967) (emphasis added).

scope." *Everglades College, Inc. d/b/a Keiser University*, 368 NLRB No. 123, slip op. at 3 fn. 3 (2019). Thus, in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70 (2020), and *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019), the Board found that the agreements at issue, which required arbitration of claims arising under the Act, were nevertheless lawful because they contained savings clauses that explicitly informed employees that they retained the right to file charges with the Board and access its processes.[3] The Board has also indicated that a savings clause may be legally sufficient, even if it does not expressly refer to "the National Labor Relations Board," "the NLRB" or "the Board," if it informs employees of their right to file claims or charges with administrative agencies generally.[4] The Board examines savings-clause language in the context of the arbitration agreement as a whole to ensure that the right of employees to access the Board and its processes is adequately safeguarded. *20-20 Communications, Inc.*, 369 NLRB No. 119, slip op. at 2–3 (2020). Here, the Agreement refers to "complet[ing] any external administrative remedy (such as with the Equal Employment Opportunity Commission)." We find, however, that this language does not sufficiently safeguard employees' right to file unfair labor practice charges with the Board.

To begin with, we doubt that a reasonable employee "aware of his legal rights" would read this language to encompass filing a charge with the Board, rather than, as stated, with the EEOC.[5] But even assuming the language about completing any administrative remedy could be reasonably interpreted to include the filing of unfair labor practice charges with the Board, the Agreement interferes with the exercise of that right by imposing mandatory preconditions on the filing of such charges. The Agreement is very specific in this regard. Employees must "first" present their claims in full written detail to the Respondent. "[N]ext," they must complete any internal review process required by the Respondent. Only after these two steps are taken do they "finally . . . complete any external administrative remedy (such as with the Equal Employment Opportunity Commission)." These preconditions render the Agreement unlawful. In finding an arbitration agreement lawful in a recent case notwithstanding its coverage of claims arising under the Act, we emphasized that the agreement "announce[d] a temporally unconditioned right to bring claims for violation of the NLRA directly to the Board," and we held that "the imposition of any condition on filing a charge with the Board . . . interfere[s] with the employee's right to file charges and violate[s] the Act." *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70, slip op. at 5 & fn. 10 (citing *NLRB v. Scrivener*, 405 U.S. 117, 121–122 (1972) (recognizing that Congress intended employees to be completely free to file charges with the Board)). Only if an arbitration agreement leaves employees free to file Board charges first can Section 10(a) of the Act retain its efficacy. See 29 U.S.C. § 160(a) (providing that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement*, law, or otherwise") (emphasis added). Moreover, under the framework established by the Respondent's Agreement, before employees could file a charge with the Board, they would have to submit their unfair labor practice claim to the very party against which that claim would be filed, opening the door to potential interference. See *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968) ("The policy of keeping people completely free from coercion . . . against making complaints to the Board

[3] The arbitration agreement in *Anderson Enterprises* contained a savings clause providing that "[c]laims may be brought before an administrative agency . . . . Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board…." 369 NLRB No. 70, slip op. at 1. The arbitration agreement in *Briad Wenco* contained a savings clause providing that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including . . . the National Labor Relations Board. . . ." 368 NLRB No. 72, slip op. at 1.

[4] See *Haynes Building Services, LLC*, 369 NLRB No. 2, slip op. at 3 (2019) (agreement at issue "did not contain a savings clause preserving employees' right to file charges with the Board or with administrative agencies generally"); *E. A. Renfroe & Co.*, 368 NLRB No. 147, slip op. at 3 (2019) (agreement at issue "[did] not contain a savings clause preserving employees' right to file charges with the Board or, more generally, with administrative agencies"); *Beena Beauty Holding, Inc. d/b/a Planet Beauty*, supra, slip op. at 2 (arbitration agreement at issue "contained no exception for filing charges with the Board or other administrative agencies"); *Hobby Lobby Stores, Inc.*, 369 NLRB No. 129, slip op. at 3 (2020) (finding legally sufficient to preserve employees' right of access to the Board savings-clause language stating that employees who sign arbitration agreement "are not giving up . . . the right to file claims with federal . . . government agencies").

[5] When evaluating a challenged rule or policy, the outcome of the analysis is "determined by reference to the perspective of an objectively reasonable employee who is 'aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA.'" *Boeing*, 365 NLRB No. 154, slip op. at 3 fn. 14 (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)); see also *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019). Viewed from this perspective, the requirement that employees "complete any external administrative remedy (such as with the Equal Employment Opportunity Commission)" would likely be understood to refer to the requirement, under Title VII of the Civil Rights Act of 1964, that employees must file a charge with the EEOC as a prerequisite to commencing a civil action. See, e.g., *Fort Bend County, Texas v. Davis*, 139 S.Ct. 1843, 1846 (2019).

is . . . important in the functioning of the Act as an organic whole.") (internal quotation marks omitted).[6]

Accordingly, we find the Respondent violated Section 8(a)(1) by maintaining the Agreement in its employment application. We do so on the basis that the Agreement restricts employees' right to file charges with the Board. For this reason, we place the Agreement in *Boeing* Category 3.

B. Confidentiality Provision

The General Counsel alleges that the Agreement's requirement that employees use "confidential . . . arbitration" unlawfully prohibits employees from discussing their wages and other terms and conditions of employment. Consistent with our recent decisions in *California Commerce Club, Inc.*, 369 NLRB No. 106 (2020), and *Covenant Care California, LLC*, 369 NLRB No. 112 (2020), we disagree and dismiss this allegation.

In *California Commerce Club*, above, the arbitration agreement at issue provided, among other things, that "[t]he arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding." Id., slip op. at 1. Assuming that this provision would violate the Act if maintained as an employer-promulgated work rule, we concluded that the FAA nevertheless shields such provisions to the extent that they specify "'the rules under which [the] arbitration will be conducted.'" *California Commerce Club*, above, slip op. at 5–6 (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Applying this principle, we held that "provisions in an arbitration agreement requiring that arbitration be conducted on a confidential basis, including provisions precluding the disclosure of evidence, award, and/or decision beyond the arbitration proceeding, do not violate the Act and must be enforced according to their terms pursuant to the FAA." Id., slip op. at 6. We reach the same result with respect to the confidentiality provision at issue here.

As noted above, the Agreement relevantly requires both parties "to use confidential binding arbitration, instead of going to court . . . ." Reasonably interpreted, the requirement to use "confidential" arbitration is not materially different from the provision in the arbitration agreement in *California Commerce Club* requiring that "arbitration shall be conducted on a confidential basis." We concluded in *California Commerce Club* that the confidentiality provision at issue there specified the rules under which arbitration will be conducted and was therefore shielded by the FAA and could not be found to violate the Act. We see no persuasive reason to reach a different conclusion here. Indeed, the word "binding" between "confidential" and "arbitration" further supports our conclusion. "Binding" clearly refers to the rules under which arbitration will be conducted by stating the parties' agreement regarding the conclusiveness of the arbitral decision. This renders even more unconvincing any interpretation of "confidential" in the phrase "confidential binding arbitration" as extending beyond the rules under which arbitration will be conducted to encompass protected discussions of "workplace matters of mutual concern, whether or not they are also the subject of an arbitral proceeding." *California Commerce Club*, above, slip op. at 7. See also *Covenant Care California*, above, slip op. at 1, 2 (agreement lawfully required that "[t]he proceedings before the arbitrator and any award or remedy shall be of a private nature and kept confidential").

In sum, the Board has held that arbitration agreements requiring that arbitration be conducted on a confidential basis, precluding the disclosure of evidence, award, and/or decision beyond the arbitration proceeding, or requiring that any award or remedy shall be of a private nature and kept confidential, are shielded by the FAA because they specify the rules under which the arbitration will be conducted and therefore do not violate the National Labor Relations Act. It necessarily follows that the confidentiality provision at issue here, which goes no further, is lawful as well.

ORDER

The National Labor Relations Board orders that the Respondent, Century Fast Foods, Inc., Chatsworth, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts exercise of the right to file charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all its forms or revise it in all its forms to make clear to employees that the Agreement does not bar or restrict

[6] We reject the Respondent's argument on exception that its Agreement is lawful because its scope is limited "to claims otherwise 'going to court.'" Addressing similar language, we explained in *Prime Healthcare* that such limiting language does not exclude actions arising under the NLRA. See 368 NLRB No. 10, slip op. at 6. Moreover, the Agreement is to be evaluated from the perspective of employees, who are unlikely to be familiar with the intricacies of judicial versus administrative jurisdiction. Id., slip op. at 6 fn. 12.

employees from exercising their right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign or otherwise became bound to the unlawful arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Post at all its facilities where the unlawful arbitration agreement is or has been in effect copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 30, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 31, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union

Choose representatives to bargain on your behalf with an employer

Act together with other employees for your mutual aid or protection

Choose not to engage in any of these protected activities

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts them from exercising their right to file charges with the National Labor Relations Board.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all its forms, or revise it in all its forms to make clear that the arbitration agreement does not restrict you from exercising your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise became bound to the mandatory arbitration agreement in any of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

CENTURY FAST FOODS, INC.

[7] If facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If any of the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after that facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Board's decision can be found at https://www.nlrb.gov/case/31-CA-116102 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Rudy L. Fong Sandoval, Esq., for the General Counsel.
Lonnie D. Giamela, Esq. (Fisher & Phillips, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. This is another case in a steady stream of cases, by now numerous, that raise issues related to the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12-60031, April 16, 2014), and more recently, *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), where the Board reaffirmed and further elaborated on the principles announced in *D. R. Horton*. This case is before me based on a Joint Motion to Transfer Proceedings to the Division of Judges and Stipulation of Issues Presented (Joint Motion), which contained a stipulated record attaching certain documents, referenced in the Stipulation of Facts that was also part of the Joint Motion, as set forth below.[1]

FINDINGS OF FACT

In their Stipulation of Facts (SOF), which is part of the Joint Motion, the parties agreed to the following facts:

1. (a) The charge in this proceeding was filed by the Charging Party on October 30, 2013, and a copy was served by regular mail on Respondent on November 5, 2013.

(b) The first amended charge in this proceeding was filed by the Charging Party on January 28, 2014, and a copy was served by regular mail on Respondent on February 3, 2014.

2. (a) At all material times, Respondent has been a corporation with an office and place of business in Los Angeles and a facility in Chatsworth, California, where Respondent has been engaged in operating public restaurants selling food and beverages.

(b) In conducting its operations during the 12-month period ending November 25, 2013, Respondent purchased and received at its Chatsworth, California facility goods and services valued in excess of $5000 directly from points outside the State of California.

(c) In conducting its operations during the 12-month period ending November 25, 2013, Respondent derived gross revenues in excess of $500,000.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

4. Charging Party William A. Lujan (Lujan) is a former employee of Respondent. Lujan worked for Respondent from about November 2, 2012, through February 13, 2013.

5. In seeking employment with Respondent, Lujan filled out, signed and dated, an application for employment on October 22, 2012, attached hereto as Exhibit A [of the Joint Motion] (employment application). The employment application does not have an "opt out" provision.

6. (a) The employment application signed by Lujan is standardized and contains a section entitled "Agreement to Arbitrate," (arbitration provision) which reads:

> Agreement to Arbitrate**.** Because of the delay and expense of the court system, TACO BELL and I agree to use confidential binding arbitration, instead of going to court, for any claims that arise between me and Taco Bell, its related companies, and/or their current or former employees. Without limitation, such claims would include any concerning compensation, employment including, but not limited to, any claims concerning sexual harassment or discrimination, or termination of employment. Before arbitration I agree: (i) first to present any such claims in full written detail to TACO BELL; (ii) next, to complete any TACO BELL internal review process; and (iii) finally, to complete any external administrative remedy (such as with the Equal Employment Opportunity Commission). In any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration will apply, except that TACO BELL will pay the arbitrator's fees, and TACO BELL will pay that portion of the arbitration filing fee in excess of the similar court filing fee had I gone to court.

(b) Multiple former and current employees of Respondent have executed the arbitration provision given to Lujan on October 22, 2012, as part of Respondent's hiring process.

7. As part of Respondent's hiring process, from October 22, 2012 through February 12, 2013, Respondent required all job applicants, including Lujan, to sign and date the employment application described above, in paragraph 5.

8. It is Respondent's position that agreement to abide by the arbitration provision contained in employment application was not a required condition of employment for an applicant to be hired by Respondent.

[1] I granted the initial Joint Motion on December 19, 2014. Thereafter, on March 26, 2015, the parties submitted a Corrected Joint Motion, which included some missing pages from the attached documents in the original Joint Motion. I granted the Corrected Joint Motion on the same day.

[2] In light of the factual stipulation contained in par. 2(a) through (c) above, I concur with the stipulation contained in par. 3, and conclude that at all times material herein, the Respondent has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

9. It is General Counsel's position that agreement to abide by the arbitration provision contained in the employment application was a required condition of employment for an applicant to be hired by Respondent.

10. About July 2, 2013, Charging Party Lujan filed a class action complaint in the Superior Court of the State of California, County of Los Angeles, Case No. BC513815 (Superior Court), attached hereto as Exhibit B [of the Joint Motion], alleging wage-and-hour and other violations under the California Labor Code and the California Business and Professions Code.

11. About October 24, 2013, Respondent filed a Notice of Motion and Motion to Compel Arbitration on an Individual Basis, Strike the Class Allegations and to Stay the Proceedings Pending Arbitration, filed concurrently with Notice of Motion; Declaration of Sheila Cook; Declaration of Lonnie D. Giamela, collectively attached hereto as Exhibit C [of the Joint Motion], (Motion to Compel) with the Superior Court.

12. About January 6, 2014, Charging Party Lujan filed an opposition to Respondent's Motion to Compel, filed concurrently with Lujan's declaration, attached hereto as Exhibit D [of the Joint Motion]. As noted by Lujan in Lujan's Declaration in support of the opposition, at paragraph 4: "During my application process, I was given a job application form. I was told by Jesse Suarez, the store manager that I needed to fill out the application, sign and date it. I was not given an opportunity to negotiate the employment application's terms or strike any terms in the application—it was a take-it-or-leave-it form." Nowhere in Lujan's declaration does it indicate that any agent of Respondent indicated that the application was a "take it or leave it form."

13. Lujan was under the age of eighteen at the time he signed the employment application containing the arbitration provision. As noted in Lujan's opposition to Respondent's Motion to Compel, noted above and attached hereto as Exhibit D [of the Joint Motion], Lujan's legal counsel took the position in those proceedings that Lujan was protected by the "infancy doctrine" which permitted him to disaffirm the arbitration provision.

14. On March 10, 2014, the Superior Court granted Respondent's Motion to Compel, attached hereto as Exhibit F [of the Joint Motion], severing from the arbitration provision the three-part internal review procedure as well as the "confidential" nature of the arbitration provision. Charging Party appealed the matter to the California Court of Appeals.

15. Respondent and Charging Party, on August 22, 2014, came to a resolution of all claims to the underlying class action complaint, including resolution of the Motion to Compel and appeal noted herein. The settlement did not resolve any class allegations as the class allegations were dismissed by the civil court. Thereafter, the Regional Director of the NLRB Region 31, did not approve Charging Party's withdrawal request of the underlying unfair labor practice matter, because the Regional Director determined settlement of the underlying civil class action complaint does not remedy the 8(a)(1) allegations in the instant complaint.

Discussion and Analysis

The parties, in the Joint Motion, also stipulated that the issues presented in this case are as follows:

ISSUE 1(a): Did Respondent violate Section 8(a)(1) by maintaining and enforcing its mandatory arbitration provision, which it required employees to sign as a condition of employment, as alleged in the instant Complaint, by filing its October 24, 2013 Motion to Compel Charging Party Lujan to individually arbitrate class wage and hour claims?

ISSUE 1(b): Did Respondent violate Section 8(a)(1) by maintaining and enforcing its mandatory arbitration provision, as alleged in the instant Complaint, by filing its October 24, 2013 Motion to Compel Charging Party Lujan to individually arbitrate class wage and hour claims, even if employees were not required to sign the arbitration provision as a condition of employment.

ISSUE 2: Whether Respondent's mandatory arbitration provision, subject of Respondent's October 24, 2013 Motion to Compel Charging Party Lujan to individually arbitrate class wage and hour claims, violates Section 8(a)(1) of the Act by restricting access to the Board and its processes, as alleged in the instant Complaint.

ISSUE 3: Whether Respondent's mandatory arbitration provision, executed by Charging Party Lujan, subject of Respondent's October 24, 2013 Motion to Compel Arbitration on an Individual Basis, violates Section 8(a)(1) of the Act by requiring that employees use "confidential arbitration" thereby prohibiting employees from discussing their terms and conditions of employment, as alleged in the instant Complaint.

1. Whether the "Agreement To Arbitrate" is a condition of employment

In order to decide the above-stipulated issues, however, a more basic and fundamental issue must first be decided, the answer to which is the key to decide the rest: Did Lujan enter into the above-described Agreement to Arbitrate (ATA) voluntarily or was agreeing to the ATA a condition of hire and thus a term and condition of employment? Respondent avers that Lujan agreed to enter the ATA voluntarily, whereas the General Counsel argues that it was a condition of employment. As discussed below, if I find that the ATA was a mandatory condition of employment, the Board's rulings in *D. R. Horton* and *Murphy Oil*, supra, would suggest that at least some aspects of the ATA and its ramifications violated Section 8(a)(1) of the Act. If, on the other hand, I find that Lujan entered into the ATA voluntarily, and that it was not a condition of employment, the same violations might not exist.

Initially, I note that the ATA is silent on the issue; there is no language in the ATA itself that explicitly mandates that an employee sign it in order to gain or maintain employment. Accordingly, I must decide whether in light of the circumstances there was an *implicit* requirement that Lujan sign the ATA as a condition of employment.

In that regard, I first note that at the time of signing, Lujan was under 18 years of age, and thus a minor. (Stipulation of Facts [SOF], ¶ 17). Second, I note that the ATA appears to be part of the employment application itself, appearing on the bottom half of the second page, just above the signature line for the applicant, and that the language of the ATA is in very small print, barely

legible.[3] Additionally, I note that Respondent's Store Manager, Jesse Suarez, gave Lujan the application and told him to fill it out and sign it, without more, and that although no one told Lujan that it was a "take it or leave it" proposition, that is how Lujan interpreted it. (SOF, ¶ 12). Finally, I note that there is no "opt out" provision in the ATA (SOF ¶ 5), and that multiple former and current employees of Respondent have executed the same ATA as part of Respondent's hiring process (SOF ¶ 6(b)). Although the SOF is silent on this issue, I find that it is reasonable to infer that no *successful* job applicant has ever refused to agree to the ATA, since the hiring of such individual under those circumstances would be a significant, even crucial, fact in favor of Respondent's position that the ATA was not a condition of employment. Thus, the mere fact that Respondent has not proffered such evidence or insisted that it be made part of the SOF signals that this has never occurred, most likely because no applicant believed that the job application would be accepted or approved if the candidate did not sign such provision. Indeed, as described above, looking at the application itself, there are no separate signature lines for the ATA and the rest of the application; there is only one single signature line at the bottom of page 2 of the application immediately after the ATA. (SOF Exh. A, p. 1–2). Thus, the ATA appears to be an organic component of the application for employment itself, and not a separate or separable component. There is absolutely no indication in the application form that would even indirectly suggest to the applicant that the ATA portion could be declined or severed from the rest of the application.

Taking all the above factors into account, I conclude that any job applicant in the same circumstances would reasonably conclude that he/she could not "opt out" of the ATA, and would reasonably believe that agreeing to the ATA was a necessary and mandatory component of the application process itself. I find that it was thus reasonably for Lujan—and any other candidate—to conclude that the whole application, including the ATA, was a "take it or leave it" proposition. Indeed, there is additional circumstantial evidence suggesting that Respondent viewed the ATA as a mandatory condition of employment. Thus, as described in the SOF, on or about October 4, 2013, Respondent filed a Motion to Compel Arbitration in the Superior Court of the State of California (SOF ¶ 11). In its Memorandum of Points and Authorities in support of its Motion to Compel (SOF Exh.t C, p.14–15) filed with the court, Respondent, citing California case precedent, indicates that when an employer imposes *mandatory arbitration as a condition of employment* (emphasis supplied), the employee cannot be made to bear the costs of arbitration. In refuting the claimant's defense in its state court pleadings that the ATA was "unconscionable" under California law, Respondent argues that the ATA provides that Respondent bears the costs of any arbitration under its terms, and therefore complied with California law requiring that employers bear the cost of arbitration imposed on employees. Such argument reasonably implies that Respondent concedes that the ATA was a mandatory condition of employment, or would likely be found to be such in state court. Simply put, I cannot imagine that Respondent would otherwise have included such language in the ATA agreeing to bear the costs of arbitration.

Accordingly, and for the reasons set forth above, I conclude that the ATA was a mandatory condition of employment. This conclusion partly answers issues 1(a) and 1(b) as stipulated by the parties and as set forth above, which posed the question whether the ATA was a mandatory condition of employment.

2. Whether Respondent violated the Act by maintaining and enforcing a mandatory arbitration provision

I now turn to the rest of the substantive issues posed by issues 1(a) and 1(b), namely whether Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint paragraph(s) 5(b) and (c), by filing its October 24, 2013 Motion to Compel Lujan to individually arbitrate class wage and hour claims.

It is clear that the Board's decisions in *D. R. Horton* and *Murphy Oil*, supra, are dispositive of these issues. In *Murphy Oil*, the Board reaffirmed its ruling in *D. R. Horton* that an employer violates Section 8(a)(1) of the Act when it requires employees, as a condition of employment, to enter into arbitration agreements that preclude them from filing class action suits regarding their wages, hours and other conditions of employment. As discussed above, I have concluded that the ATA was a mandatory condition of employment. Although the ATA itself is silent on the issue of employees bringing class actions, Respondent tipped its hand when it filed its Motion to Compel Arbitration on an Individual Basis (and striking class action) in California State Court. This type of action was found unlawful by the Board in *Murphy Oil*, citing *D. R. Horton*, the only distinction being that the court action filed by the employer in that case was in federal court, as opposed to a state court action in the present case—a distinction without a difference. I find it unnecessary to explain or elaborate regarding the Board's rationale for its rulings in *D. R. Horton* and *Murphy Oil*, both which provide lengthy analysis and discussions of these issues. By now, there have been multiple cases heard by Board administrative law judges throughout the country regarding these issues since the Board decided *D. R. Horton*, and multiple cases now pending before the Board on these matters. Although the facts in each of these cases may vary somewhat, the universal theme in most, if not all of them, is the validity of compulsory arbitration agreements that preclude employees from seeking class action litigation to vindicate their rights. Almost without exception, these types of compulsory arbitration agreements have been found to be unlawful, as have employer actions to enforce such agreements. These issues can fairly be described as controversial, particularly in light of the 5th Circuit Court of Appeals'—and arguably other Circuits'—disagreement with the Board's ruling in *D.R. Horton*, but by now the Board's position on these matters is clear and well publicized.

In that regard, I note that in its brief Respondent makes an impassioned argument against the Board's ruling in *D.R. Horton*

[3] Although the SOF makes no mention of this, I assume that the copy of the application that is attached as SOF Exhibit A, pages A-1 and A-2, is a true copy of the application for employment submitted by Lujan, which reflects the actual size of the application and the font size contained in such document. Even if a true copy of the application and the size of the font was larger, however, it would not impact my conclusions, as discussed below.

and *Murphy Oil*, citing the courts' rejection of the Board's ruling and rationale in *D. R. Horton*, which Respondent argues was wrongly decided. Suffice it to say, however, that in the absence of a Supreme Court ruling on this line of cases, I am compelled to follow the Board's rulings, not the rulings of any Circuit court. *Pathmark Stores*, 342 NLRB 378, fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part, 331 F.2d 176 (8th Cir. 1964). Thus, unless there is an unexpected reversal by the Board on its views in these matters in the near future, it is reasonable to infer that the Board will continue on this path unless the Supreme Court overrules it, or until *all* Circuit courts disagree with the Board and its orders become unenforceable. This last scenario would, at least in the near future, be very unlikely for purely logistical reasons if nothing else. In that regard I note that many of the cases now pending before the Board were not actually litigated, but rather submitted via stipulated records, as the present case was, in order to "fast track" these issues to the Board, and eventually to the Circuit courts in order for employers to test the Board's *Horton* doctrine. Thus, employers—and their representatives—are by now on notice that the Board will continue to find these types of compulsory arbitration agreements and actions to enforce them to be unlawful.[4]

Respondent additionally makes what I believe is a novel argument: that the State of California (or its Supreme Court) should be joined as an indispensable party in this matter because the California Supreme Court has ruled that under California law class action waivers are enforceable, and because the lower state court (California Superior Court) was responsible for the ruling that the ATA's silence regarding class actions must be interpreted as prohibiting such actions.[5] This argument is not valid, for a couple of reasons. First, in *Iskanian* (see fn. 5, below), the California Supreme Court indicated that its ruling finding class action waivers enforceable was mandated by the U.S. Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, ___ US___, 131 S.Ct. 1740 (2011) *(Concepcion)*, which pursuant to the Federal Arbitration Act (FAA) reversed a prior California Supreme Court ruling that had restricted class action waivers in arbitration agreements. Thus, it is incorrect to suggest, as Respondent does, that its actions are mandated by California law in contravention of the Board's *D. R. Horton* and *Murphy Oil* rulings. In both *Horton* and *Murphy Oil* the Board explains why the U.S. Supreme Court's ruling in *Concepcion* is inapplicable to situations involving employees in the exercise of Section 7 rights. Simply put, California law or its interpretation by the California courts has nothing to do with the legality of Respondent's conduct, which in this case is subject to federal labor laws.[6] Thus, Board law is controlling in this instance, and to the extent that California law conflicts with federal law in this matter, federal law preempts California law, which was the very basis for the *Concepcion* ruling.

Secondly, regarding Respondent's argument that it was the lower state court (California Superior Court) which ruled that the ATA's silence on the issue of class arbitrations amounted to a prohibition of such class actions—thus implying that Respondent had no choice in the matter —, such ruling was again mandated by an earlier U.S. Supreme Court decision in *Stolt-Nielsen S.A. v. Animal Feeds International Corp*, 559 U.S. 662 (2010), a ruling which was followed by the California Court of Appeal in *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115, 1128 (2012). Indeed, this is pointed out by Respondent in its Memorandum of Points and Authorities in support of its Motion to Compel (SOF Exh. C, p. 12–13). Thus, Respondent knew, or should have known, as early as 2010, when the Supreme Court decided *Stolt-Nielsen*, and certainly by 2012, when the California Court of Appeal decided *Nelsen*, that an arbitration agreement's silence on the issue of class arbitration meant that such class actions would be precluded.[7] When Respondent proffered Lujan the job application containing the ATA on October 22, 2012, for him to sign, it knew, or should have known, that the ATA's silence sealed the fate of class arbitrations, as a matter of federal and state law. Respondent could have proffered Lujan an arbitration agreement that explicitly did not preclude class action, or at least allowed him to "opt out" of any restrictive arbitration agreement, but did not do so. Respondent thus knew it was forcing Lujan and others into individual arbitrations when it proffered the application form, including the ATA, to its job applicants. Accordingly, Respondent's attempt to divert responsibility for its conduct to the state of California fails, and it is not necessary to join California, or any of its political subdivisions, as an "indispensable" party, because they are not.

For the above reasons, I conclude that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration provision, as alleged in paragraphs 5(a), 5(b), and 8 of the complaint.

3. Whether Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration provision that restricts access to the Board and its processes

I now turn to the question of whether the language of the ATA restricted Lujan, or other employees, from access to the Board's processes in violation of Section 8(a)(1) of the Act. Pursuant to the Board's ruling in *Lutheran Heritage Village-Livonia*, 343

[4] A possible exception to the likelihood of this outcome involves situations where employees are allowed to "opt out" of arbitration agreements, so that those who choose **not** to opt out can be said to have voluntarily agreed to such arbitrations. This possibility was raised by the Board in footnote 28 of its *Horton* decision, where it indicated that a "more difficult question" would be posed where an employer and employee entered into an arbitration agreement that was not a condition of employment to resolve either a particular dispute or all potential disputes through nonclass arbitration rather that litigation in court. The Board has yet to answer its own question, but at least two administrative law judge decisions have addressed this issue, finding that these types of voluntary agreements do not violate the Act. See, e.g., *Bloomingdale's, Inc.*, JD (SF)-29–13 (May 25, 2013); and *Valley Health System LLC*, JD(SF)-08–15 (March 18, 2015). Other administrative law judges have disagreed—See, e.g., *Kenai Drilling Limited*, JD (SF)–13–15 (April 13, 2015); *RPM Pizza*, JD (ATL)-20–14 (July 11, 2014).

[5] Respondent cites the California Supreme Court's ruling in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 366–374 (2014).

[6] Thus, the fact that the California Supreme Court, in *Iskanian,* agreed with the Fifth Circuit's ruling on *D.R. Horton* and rejected the Board's rationale in that case is of little consequence, since a state court's rulings carry no weight on matters of Federal labor law.

[7] *Nelsen* was decided on July 18, 2012.

NLRB 646 (2004), I must first determine if the ATA explicitly restricts activities protected by Section 7. If so, the ATA is unlawful. If the ATA does not explicitly restrict Section 7 rights, I must examine the following criteria: (1) whether employees would reasonably construe the language to prohibit (or restrict) Section 7 activity; (2) whether the ATA was promulgated in response to union activity; (3) whether the ATA has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage*, at 647. See also *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra.

As discussed previously, the ATA is silent on the question of class action preclusion, and does not explicitly prohibit filing charges with the Board or explicitly restrict other Section 7 activity-except, as will be discussed below, with regard to the confidentiality of the arbitration process. Additionally, there is no evidence that the ATA was promulgated in response to union activity, so criteria number 2, above, is not applicable. Finally, there is no evidence that Respondent applied the ATA to restrict employee access to the Board's processes, so criteria number 3 is likewise not applicable. The question of whether the ATA restricts access to the Board's processes thus turns on the answer to the first criteria above, namely whether employees could reasonably interpret or construe the ATA's language to restrict access to the Board's processes.

I conclude that given the breadth of the ATA's initial language, which mandates arbitration "for *any* claims that arise between me and Taco Bell . . . (w)ithout limitation, such claims would include any concerning compensation, employment (SIC) including, but not limited to, any claims of sexual harassment or discrimination, or termination of employment" (emphasis supplied), employees could reasonably and likely interpret or construe it to restrict access to the Board's processes. Respondent argues that the phrase that immediately precedes the above-quoted language, which states "I agree to confidential arbitration, instead of going to *court*, for any claims" (emphasis added) negates any unlawful inference, because going to the Board is not the same as going to *court*. The Board has rejected similar arguments, however, noting that typical "nonlawyer employees" do not have specialized legal knowledge to making the fine distinction between administrative and judicial processes. *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 slip op. at 2 (2011); *U-Haul Co. of California*, 347 NLRB at 377–378.[8] Thus, any non-legally trained employee—which, presumably includes most employees of Taco Bell—could reasonably conclude that the above-cited language of the ATA would preclude them from seeking any legal remedy prior to submitting to arbitration, including filing charges with the Board. The same holds true for the language on subsection (iii) of the ATA which *follows* the above-quoted broad language, which states that prior to going to arbitration, the employee must "complete any external administrative remedy (such as with the Equal Employment Opportunity Commission." This language is similar to other "savings clauses" that have been held insufficient by the Board in light of the broader and sweeping mandatory arbitration language in the rest of the agreement, including *Murphy Oil*, where the savings clause actually appeared to permit employees to proceed to the NLRB. See also *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Cellular Sales*, 362 NLRB No. 27 fn. 4. Moreover, such a clause at best creates an ambiguity which must be construed against Respondent as the ATA's drafter. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

Accordingly, for the above reasons, I conclude that the ATA violates Section 8(a)(1) of the Act by interfering with employees' right to access the Board's processes.

4. Whether the ATA violates Section 8(a)(1) of the Act by requiring employees to keep any arbitration proceedings "confidential"

As described above, the language of the ATA requires employees to use "confidential" arbitration to resolve any employment-related disputes. This language explicitly commands that any arbitration proceedings be kept confidential, which reasonably implies that employees cannot discuss with each other the facts, circumstances, history, tactics, justification, motivation or outcome regarding any arbitration proceeding they are compelled by the ATA to use in order to vindicate their employment-related rights. The right of employees to discuss these matters with each other lies at the very core of Section 7, which protects—and encourages—concerted activity for their mutual aid and protection. It is well-settled that any work rules that prohibit, or can reasonably be interpreted to prohibit, employees from discussing their wages, hours, or working conditions which each other are unlawful. *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 73–74 (2014); *Lily Transportation Corp.*, 362 NLRB No. 54 fn. 2 (2015); *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

Accordingly, I conclude that by maintaining an arbitration policy, which I have previously concluded was a mandatory condition of employment, that requires that any arbitration used by employees be kept confidential, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that mandates individual arbitration and precludes class actions by employees for wage and hour claims or other employment-related claims in any forum, arbitral or judicial.

3. Respondent violated Section 8(a)(1) of the Act by filing a Motion to Compel Arbitration on an Individual Basis in California Superior Court in case No. BC513815 on or about October 24, 2013.

4. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that employees could reasonably construe to preclude filing of

[8] Indeed, the arbitration agreement found unlawful by the Board in *Murphy Oil*, supra, used similar language requiring employees to use arbitration instead of suing *in court*.

charges with the Board.

5. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that requires employees to keep any arbitration confidential.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the Agreement to Arbitrate (ATA) is unlawful, Respondent must revise or rescind the ATA and advise their employees in writing that the ATA has been revised or rescinded. Further, Respondent shall post notices in all locations where the ATA was in effect informing employees of the revision or rescission of the ATA, and shall provide said employees with a copy of any revised agreement. Any revision should clarify that such agreement does not bar or restrict employees from seeking class wage and hour actions or any other type of class employment-related actions in any forum, and specifically does not bar or restrict employees from filing charges with the NLRB. Additionally, any such revised agreement shall inform employees that they are not barred or restricted from communicating or discussing with each other any matters regarding their wages, hours or working conditions, including any such matters covered by arbitration.

Respondent shall further be ordered to notify the State Court in Case No. BC513815 that it no longer opposes the plaintiffs' claims on the basis of the ATA, which has been rescinded or revised because it was found unlawful, and to move the court to vacate its order compelling individual arbitration on the basis of the ATA.[9] Respondent shall also be ordered to reimburse Charging Party Lujan for all reasonable expenses and legal fees, with interest, incurred in opposing Respondent's unlawful petition to compel individual arbitration in a collective action. Interest shall be computed as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Upon the entire record, I issue the following recommended.[10]

ORDER

Respondent, Century Fast Foods, Inc., a corporation with an office and principal place of business in Chatsworth, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory and binding arbitration agreement that require employees, as a condition of employment, to waive their right to pursue class or collective claims in all forums, whether arbitral or judicial.

(b) Maintaining a mandatory and binding arbitration agreement that employees would reasonably believe bars or restricts employees' rights to file unfair labor practice charges with the National Labor Relations Board or to access the Board's processes.

(c) Maintaining a mandatory and binding arbitration agreement that requires employees to keep confidential any arbitration proceedings undertaken as the result of such agreement.

(d) Filing a petition to enforce its Agreement to Arbitrate to thereby compel individual arbitration and preclude employees from pursuing employment-related disputes with the Respondent on a class or collective basis in any forum.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory and binding arbitration agreements in all of its forms, or revise them in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, whether arbitral or judicial; that they do not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes; and that they do not restrict employees' right to discuss arbitration proceedings with each other.

(b) Notify all current and former employees who were required to sign the arbitration agreement in any form that they have been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, notify the Superior Court of the State of California in Case No. BC513815 that it has rescinded or revised the mandatory arbitration agreement upon which it based, its motion to dismiss William Lujan's collective action and to compel individual arbitration of his claim, and inform the court that it no longer opposes the action on the basis of the arbitration agreement.

(d) In the manner set forth in this decision, reimburse William Lujan for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing Respondent's petition to dismiss the wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at all its locations in California where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting

[9] Pursuant to the Board's *D.R. Horton* and *Murphy Oil* rulings, Respondent is free to oppose class certification on any basis *other* that an unlawful arbitration agreement compelling employees to arbitrate employment disputes on an individual basis. As the Board observed, employees have Section 7 rights to *seek* class actions, not to have such class actions approved.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 22, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. April 24, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory and binding arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain and/or enforce a mandatory and binding arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain and/or enforce an arbitration agreement that prohibits employees from discussing arbitration proceedings with each other.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory and binding Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums; that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes; and does not prohibit you from discussing arbitrations with each other.

WE WILL notify all current and former employees who were required to sign the mandatory Agreement to Arbitrate in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the court in which William Lujan filed his collective wage claim that we have rescinded or revised the mandatory Agreement to Arbitrate upon which we based our petition to dismiss his collective wage claim and compel individual arbitration, and

WE WILL inform the court that we no longer oppose William Lujan's collective claim on the basis of that agreement.

WE WILL reimburse William Lujan for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing our motion to dismiss his collective wage claim and compel individual arbitration.

CENTURY FAST FOODS INC.